In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

R. FREDERIC FISHER
LILLICK MCHOSE & CHARLES
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
Attorneys for Respondent Pacific Maritime Association

Of Counsel
EDWARD D. RANSOM
GARY J. TORRE
BARBARA H. BUGGERT

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BORS PRINTING COMPANY OF CALIFORNIA, 349 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondent Pacific Maritime Association (PMA) urges that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be denied.

REFERENCES TO OPINIONS BELOW, TO JURISDICTION AND TO STATUTORY PROVISIONS

PMA adopts the references to opinions below, to the jurisdiction of this Court and to the relevant statutory provisions set forth in the petition for certiorari.

QUESTION PRESENTED

A union (ILWU) representing a work force pool of "registered" dockworkers, who work at times for various employer members of PMA and at other times for nonmember employers, negotiated a collective bargaining contract with PMA. The contract required PMA to permit any nonmember employer of registered dockworkers to participate in industry-wide fringe benefit programs administered by PMA and ILWU and conditioned nonmember employment of registered dockworkers on the employers participating in all the fringe programs, and accepting the same terms and conditions of employer access to the registered work force applicable to PMA members.

Certain nonmember employers contended that as a practical matter they would be forced "into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit" (*Pacific Maritime Ass'n v. Federal Maritime Comm'n*, 543 F.2d 395, 409 (D.C. Cir. 1976); Pet. 1a, 36a) and that although the union was not subject to Shipping Act regulation, such a maritime labor agreement could not be implemented until approved by the Federal Maritime Commission ("the Commission") under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) (Appendix A hereto).

The question presented is:

> Whether an agreement collectively bargained by a union and an employers' association, not affecting tariffs or practices regulated by the Commission, presents Shipping Act section 15 questions of such importance that the balancing of labor and antitrust policy required to determine whether the agreement is labor exempt should be removed from federal district courts and committed to the Federal Maritime Commission under the pre-implementation approval/antitrust exemption process of section 15.

STATEMENT OF THE CASE

PMA adopts the summary of the factual record set forth in the opinion of the court of appeals below at 543 F.2d at pages 396-99 (Pet. 3a-10a). The statement in the petition is misleading insofar as it relies upon certain conclusions of the Commission challenged by PMA and ILWU before the court of appeals. Such conclusions were implicitly rejected by the court, although the disposition of the case made it unnecessary to rule thereon.

The questions here are peculiar to the stevedoring industry in which registered dockworkers[1] rotate their employment among different employers and constitute a shared, finite industry resource. Registered dockworkers are the beneficiaries of complex and enormously expensive industry-wide fringe benefit programs administered by PMA and ILWU and developed over a genera-

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1. International Longshoremen's and Warehousemen's Union (ILWU) represents all dockworkers within the bargaining unit described by the N.L.R.B. as "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of . . . [PMA's predecessor]." (*Shipowners Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002, 1041 (1938); *See* C. Larrowe, *Shape-up and Hiring Hall* 111 (1955).) Registered dockworkers are a delimited subset of the total ILWU-represented work force, entitled to priority in being hired by PMA employers and to extensive industry-wide fringe benefits. (*See Pacific Maritime Ass'n and Maboney*, 140 N.L.R.B. 9, 12 (1962).)

The registration procedure by limiting the size of the work force, permits a high per capita income. *Compare Larrowe, supra* at 52, Table 2, with *id.* at 166, Table 5. The assignment of jobs on a strict rotational basis within registered classes stabilizes and equalizes the income. *See Larrowe, supra* at 144-48, 165-66. Some limitation on the size of the eligible class is necessary to the operation of a system of fringe benefits, and registration also serves that function. Control of registration lies with the labor relations committee in each port. (*See ILWU v. Kuntz*, 334 F.2d 165, 169 (9th Cir. 1964); *ILWU (Waterfront Employers Ass'n)*, 90 N.L.R.B. 1021, 1050 (1950).)

tion. (J.A. 171-72.) These programs involve substantial long-term liabilities of PMA's membership as a whole. (J.A. 369.) Calculation and payment of benefits accrued by particular dockworkers and determination of particular employers' obligations depend upon PMA's central payroll and record keeping functions. (543 F.2d at 397, n. 2; Pet. 3a-4a, n. 2; J.A. 134, 172, 212-14.)

Basic problems follow from the foregoing facts. On days when nonmembers of PMA employ registered dockworkers, will the dockworkers continue to accrue ILWU/PMA plan benefits and, if so, how will this be financed? Should employers choosing not to join the association be permitted to participate in the fringe plans and, if so, should PMA run a fringe program for nonmembers on terms less onerous than for the members? ILWU's insistence, between 1970-72, on the nonmembers participating as of right in the fringe plans took these questions out of PMA's hands, but PMA did bargain for conditions on that participation.

Prior to 1972, nonmember employers of registered dockworkers participated in some or all of the fringe programs by negotiating with ILWU and PMA. PMA was not obligated to ILWU to permit such participation. Nonmember employers did not pay the full costs of administering the fringe programs. (543 F.2d at 397; Pet. 4a, 55a-56a; J.A. 172-73, 176, 369, 372.) Moreover, they were free to continue to use the joint industry resource—the registered work force—during strike or lockout occurring within the term of the labor contract and while PMA employers were shut down, thus encouraging ILWU whipsaw tactics. (543 F.2d at 397; Pet. 4a.)

The collective bargaining terms in issue arose in an opening ILWU bargaining demand of November 16, 1970, which read:

> "XVI. *Fringe Benefit Contributions*
>
> The contract provide that PMA *will accept all fringe benefit contributions from any employer whether or not such employer is a member of the PMA.*" (J.A. 170. *See* 543 F.2d at 397; Pet. 4a.) (Emphasis supplied.)

PMA did not acquiesce in this demand. Three weeks later PMA counter-proposed:

> "XVI. *Fringe Benefit Contributions*
>
> The Employers propose that all applicable Sections of the Agreement be amended *to eliminate non-member participation* under any provisions of the Agreement unless they are not permitted by law to become members of The Association. Further, the employers propose that all supplemental agreements [fringe benefit agreements] to the Coast Agreement be amended as of July 1, 1971, to exclude non-member participation." (*Ibid.*) (Emphasis supplied.)[2]

After strike, mediation and extensive bargaining (J.A. 169-71; 543 F.2d at 397, 399, 406; Pet. 4a-5a, 9a, 28a-29a) an ILWU/PMA compromise was reached. It required PMA to permit nonmember participation in the fringe benefit programs as of right and any nonmember employer wishing to use the registered work force (as opposed to other ILWU dockworkers) to participate in all the fringe programs and share in all the associated costs. Nonmember and member employers were guaranteed equality of access to the registered work force as well as to the PMA/ILWU

2. The PMA counter proposal would have given nonmember employers choices of joining PMA under PMA's open door membership policy, of negotiating and creating their own comparable fringe benefit programs for registered dockworkers, or of negotiating with ILWU for nonregistered dockworkers. Despite sworn testimony by ILWU that it would bargain with nonmembers for non-registered dockworkers, (J.A. 217-18) the Commission concluded that ILWU would probably demand that registered dockworkers be employed. That, and the costs to nonmembers of "going it alone", would mean that they had little practical choice but to accept the nonmember terms or become PMA members. This resulted in a finding of "imposition of terms" even though there were no findings of PMA/ILWU conspiracy or any other agreement for ILWU to impose the terms. (J.A. 530-31; Pet. 69a-70a.)

fringe programs, and ILWU whipsaw tactics were discouraged, as to disputes occurring during the contract term, by provisions precluding the furnishing of registered dockworkers to nonmember employers during strike against or lockout by PMA employers. (543 F.2d at 397-99; Pet. 4a-7a; J.A. 452-54; Appendix B hereto.)

Several nonmember employers attacked the agreement by bringing antitrust actions in federal district court (543 F.2d at 399, n. 11; Pet. 8a-9a, n. 11) and by filing a petition with the Commission seeking a ruling that the terms were analogous to those in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968) (hereinafter *"Volkswagen"*), and could not be implemented without Commission approval under section 15 of the Shipping Act, 1916. The Commission obtained a stay of the antitrust actions, pending its own resolution of the Shipping Act and labor exemption issues. (J.A. 518; Pet. 51a.)

Section 15 precludes pre-approval implementation of certain agreements among carriers and terminal companies subject to the Act. It permits the Commission to disapprove such agreements on "public interest" and other regulatory grounds, to modify the terms or to approve and thereby exempt them from the antitrust laws. The Commission's regulations require submission of executed agreements and requisite copies in writing, together with evidence of the authority of the signing party (46 C.F.R. § 522.3) plus a statement of Shipping Act justification.[3] (46 C.F.R. § 522.5.) Thereafter, assuming no protest requiring formal hearing[4] and that the Commission believes that the standards of

3. Proposed regulations for submission of section 15 agreements, which codify much recent administrative practice and which typify present section 15 approval realities immensely complicate and lengthen the approval process described above. These regulations are attached as Appendix C.

4. In *Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir 1969), the court reversed the Commission for approving a protested section 15 agreement without evidentiary hearing.

the Act are met, the Commission approves the agreement. Otherwise it is handled as litigation, a process which, as here, can take years to resolve.

Contrary to the petition, which cites no source, the Commission has neither followed nor announced a "general policy promptly to grant interim approval to collective bargaining agreements in appropriate cases" (Pet. 16; *see* Pet. 10). In the only reported case, so far as we can determine, where a collective bargaining agreement received interim approval, such approval was granted nearly a year after the agreement was placed before the Commission, plus an unknown amount of time following actual union/management agreement.[5] (*New York Shipping Ass'n v. Federal Maritime Comm'n*, 495 F.2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974) (hereinafter *"New York Shipping"*).) Further, where parties to an agreement deny the Commission's jurisdiction they cannot very well simultaneously invoke that jurisdiction by seeking interim approval. PMA and ILWU consequently did not do so here.

Although the Commission's Hearing Counsel and Commissioner Morse, dissenting, urged that the labor exemption questions were "foreign to its expertise" (543 F.2d at 398-99; J.A. 533; Pet. 8a, 74a), the Commission denied the exemption and asserted jurisdiction. It did so, based upon tests developed in an

5. In the instance reported, the Commission granted interim approval to a collective bargaining provision involving *Volkswagen*-type cost allocations among employers, where it was possible to undo the effects of an interim approval through subsequent reimbursement of fringe benefit assessments. (*New York Shipping Ass'n v. Federal Maritime Comm'n supra*, at 1218.) Interim approval there was granted on June 12, 1973. The agreement was placed before the Commission July 31, *1972*. The decisions do not reveal how much additional time elapsed between agreement at the bargaining table and formal presentation to the Commission. (*See New York Shipping, supra*, 495 F.2d at 1218 and the Commission's decision therein, 16 F.M.C. 381.)

Interim approval of "labor-related" cost allocation agreements has involved consent thereto by opposing parties and circumstances where assessments later found excessive could be reimbursed. Most collective bargaining provisions do not admit of this solution.

earlier case purporting to distill this Court's decisions on the labor exemption question into four brief criteria. The Commission believed that the failure to meet any one of them was a ground for withholding the labor exemption.[6]

The Commission determined that the instant collective bargaining terms forfeited the labor exemption. First, the Commission held that the nonmembers had no practical choice but to accept the terms and that denial of the exemption need not rest on findings of a conspiracy or other PMA/ILWU agreement to impose the terms. (J.A. 522, 525, 530-31; Pet. 58a, 62a-63a, 69a-70a.) Second, because the Commission believed that the ILWU had only an "incidental" interest in the terms, it ruled that they did not constitute mandatory bargaining subjects. (J.A. 525; Pet. 62a; *see* J.A. 520, 524, 530; Pet. 55a, 60a-61a, 62a, 69a.) The Commission made no finding as to the good faith, "eyeball to eyeball" nature of the bargaining (J.A. 523; Pet. 59a), although the evidence in support of such conclusions was uncontradicted. (J.A. 169-73, 185-88, 194-211, 216-17.) The Commission recited that it had weighed Shipping Act against labor interests (J.A. 530; Pet. 69a), but the only Shipping Act interests or competition effects "weighed" were not effects of the terms of the agreement but likely effects on nonmembers declining to be bound thereby, thus equating the question of "imposition" of the terms with the question of their competitive effects. (J.A. 530-31; Pet. 69a-70a.)

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6. "1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are 'arms-length' or 'eyeball to eyeball'.

2. The matter is a mandatory subject of bargaining, e.g., wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose term on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management." (J.A. 522-23; Pet. 58a; *see* J.A. 530; Pet. 69a; *United Stevedoring Corp. v. Boston Shipping Ass'n*, 16 F.M.C. 7, 13 (1972).)

Although the Commission's conclusion that the terms were subject to section 15 approval was based on application of *Volkswagen*, there were no findings of any inter-employer cost allocation agreement having "pass through" effects on prices subject to regulation,[7] which two courts of appeals have recognized as the "heart" of *Volkswagen*. (*See* n. 8, *infra*.)

ILWU and PMA challenged the Commission's conclusion that ILWU had little interest in the subjects bargained and the legal conclusion based thereon that the terms were not mandatory bargaining subjects. They attacked the Commission's conclusion that PMA and ILWU had imposed the terms on nonmembers, and they asserted that under this Court's rulings the Commission's findings were inadequate to support its conclusion that the labor exemption was forfeited. Finally, they challenged the Commission's distillation of this Court's labor exemption rulings as a mechanistic distortion of those rulings.

The court treated the subjects bargained as core labor subjects and found the Commission's findings of lack of union interest in the contract terms "highly questionable." (543 F.2d at 397, n. 1; Pet. 3a, n. 1.) The court held that, balancing labor and Shipping Act considerations, the instant collectively bargained terms were not subject to section 15, since, unlike *Volkswagen* and *New York Shipping* they did not produce discriminatory rates —"a primary concern of the [Shipping] Act . . . ."—while they did concern core labor issues. (543 F.2d at 409; Pet. 35a-36a.) Moreover, the challenge to the agreement—in essence that it would "allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the

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7. Unlike *Volkswagen*, where there was a finding of an additional cost of $2.35 per auto necessarily passed on in the price (390 U.S. at 265-66), there are no findings here of any new costs for nonmembers in any particular amount, or of the economic or competitive significance, if any, of such costs. There are no findings of any price effects.

multi-employer unit" (543 F.2d at 409; Pet. 36a)—failed to state Shipping Act issues.

The court's rationale went beyond the instant agreement to emphasize that the section 15 line should be drawn between "labor-related" agreements affecting regulated prices (as in *Volkswagen*) and agreements actually "negotiated between union and management" (543 F.2d at 408-09; Pet. 34a), as here. The court stressed the inconsistency of the inherent delays and second guessing of the section 15 pre-implementation approval process with the realities of collective bargaining, the Commission's lack of labor expertise and the absence of anything in the history of the Shipping Act suggesting an intent to regulate labor agreements. Thus, the court concluded that challenges to a labor exemption for maritime labor/management negotiated agreements should be mounted in federal district courts under the antitrust laws, as with labor agreements of all other industries, regulated or not.

The court followed *Volkswagen*. *Volkswagen* held that the Commission had jurisdiction over an inter-employer agreement allocating fringe benefit costs, having "pass through" and arguably discriminatory effects on prices subject to Commission regulation,[8] but "emphasized":

> *"We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. . . . Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity."* (*Volkswagen, supra,* 390 U.S. at 278.) (Emphasis by the court of appeals; *see* 543 F.2d at 408; Pet. 33a-34a.)

8. In *New York Shipping* the court of appeals recognized that the "heart of *Volkswagenwerk*" was that the inter-employer agreement would "alter relations among shippers of various types of cargo" (495 F.2d at 1221) or, as the court here phrased it, "produced discriminatory tariffs." (543 F.2d at 409; Pet. 35a-36a.)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Case Does Not Present a Conflict Between Circuits or Facts and Issues Appropriate for Resolving a Future Conflict.

This case does not present facts or findings whose disposition under section 15 is subject to any conflict between the Second Circuit in *New York Shipping* and the District of Columbia Circuit here. The case is, therefore, not a suitable vehicle for resolving areas of possible future conflict between the underlying rationale adopted by the two circuits.

The only question as to which there is even arguably conflict between the two circuits is whether future *Volkswagen*-type inter-employer cost allocation formulae affecting regulated prices and inserted into collective bargaining contracts, are subject to section 15 or the antitrust laws. This case does not present those facts or that issue. It presents only contentions that nonmember employers were forced to accept "the same wage, fringe benefit and work stoppage terms" as PMA members. (543 F.2d at 409; Pet. 36a.)[9] Nothing in *New York Shipping* suggests that the Second Circuit would have subjected the ILWU/PMA nonmember provisions to section 15. Because there is no conflict about dis-

9. Participation in existing ILWU/PMA fringe programs on an equal basis with PMA members produces significant cost savings to nonmembers as compared to providing comparable fringe programs on their own. (J.A. 188, 190; see J.A. 177.) There are no findings and no evidence of any labor costs for nonmembers that are higher than for members similarly situated.

Although the petition asserts that there would be "higher costs to nonmembers than to members . . . ." (Pet. 7) it simultaneously qualifies this assertion by conceding that it arises as a result of differing "operations and locality," of particular employers rather than from differing terms. (Id.) Of course identical terms or wage scales in any industry-wide contract usually result in differing ultimate labor costs as between one employer and another because of differing geographical, operational and managerial factors. These range from a particular employer's distance from the hiring hall in the case of travel time costs to the differing ability of employers to utilize labor efficiently or displace it with capital equipment so as to lower total wage costs. *The important point is that there is no finding, evidence or contention here that the present terms would create any cost for a nonmember employer higher than for a PMA employer similarly situated.*

position of the present case the Commission is not placed in an "untenable position" (Pet. 12) nor is it subjected to conflicting directives or even dicta concerning section 15 treatment of the present provisions or, for that matter, of 99.5% of all maritime collective bargaining.

It is unlikely that the court of appeals here would disagree with the Second Circuit that *Volkswagen* requires section 15 approval for an inter-employer assessment formula inserted into a collective bargaining agreement *without* good faith bargaining on the formula. The court's rationale below was that section 15 excluded only agreements actually "negotiated" with the union. (543 F.2d at 396, 409; Pet. 2a, 34a.)

If there is any probable conflict between the two rulings and any dilemma for the Commission created thereby it is whether to apply the broad rationale of the court's decision here to a future case involving an inter-employer cost assessment formula affecting regulated prices and found to have been actually negotiated in good faith with the union. There is doubt, however, whether there is a conflict with the Second Circuit on that question either. *New York Shipping* was decided on a record in which the Commission had refused to make a finding whether the bargaining was in good faith, where the Commission had found that the union was included "as a nominal party to the assessment formula agreement" and where the union's interest was found to be confined to assurance of payment of benefits as opposed to any interest in the assessment formula. (*New York Shipping Ass'n—NYSA/ILA Man-Hour/Tonnage Method of Assessment*, 16 F.M.C. 381, 389, 391 (1973), *aff'd, New York Shipping Ass'n v. Federal Maritime Comm'n*, 495 F.2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974).) Had there been an administrative finding of good faith bargaining with the union on the assessment formula in *New York Shipping* and of union interest therein,[10] it is entirely possible that the Second Circuit would have excluded the agreement from section 15.

As the petition points out (Pet. 17), the court of appeals held that a balance of labor and Shipping Act interests compels exclusion of the agreement from section 15. This is the actual holding of the case as contrasted to the dicta or broad rationale on which the petition focuses. Understandably, the Commission desires an advisory opinion whether it should be guided by the broad rationale of the court of appeals here or by the rationale of *New York Shipping* when a future case arises involving an assessment formula bargained in good faith and which "compel[s] discriminatory rates". (543 F.2d at 409; Pet. 36a.) This case does not pose the question, and it is doubtful that *New York Shipping* poses it. If it should become necessary for this Court to resolve the question at all it should do so where the Court has the benefit of a case involving a *Volkswagen*-type agreement in a collective bargaining contract, findings below whether bargaining thereof was in good faith, and a record as to the union's interest in the terms. Because neither this case nor *New York Shipping* provides the appropriate case or record the issue is premature to resolve now.

2. The Court of Appeals Did Not Adopt a Per Se Rule; It Left Balancing of the Interests with the Federal District Courts.

The court held that the instant negotiated labor agreement was exempt from section 15, because it concerned "wage, fringe benefit and work stoppage terms" allegedly forced upon nonmembers

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10. A union might have a vital interest in the assessment formula chosen. The *New York Shipping* case did not present a record enabling this determination, but it did cast very serious doubt on the ILA's interest there.

(543 F.2d at 409; Pet. 36a), not discriminatory tariffs. Neither the holding of the case nor the broader rationale respecting removal of negotiated labor agreements generally from section 15 is a per se rule which avoids balancing of competitive and labor interests. To the contrary, it is a determination that, as with every other industry, regulated or not, balancing should be performed under the antitrust laws by courts having both labor and antitrust experience. The Federal Maritime Commission is inexperienced in and unqualified to perform this function, a function not bestowed on any other regulatory agency.

Section 15's approval standards relate to regulated shipping rates and practices under semi-cartel conditions exempt from the antitrust laws. They do not state either labor standards or requirements for free competition.[11] Since, as the petition concedes, the labor exemption for maritime labor agreements involves a balancing of labor policies with pro-competitive antitrust policies "under *Pennington* and related cases" (Pet. 19), not under some different Shipping Act test, it is anomalous to have that balancing performed by the Commission, under standards designed to perpetuate intrinsically noncompetitive rate or pooling agreements.

The other section 15 case involving a non-*Volkswagen*-type labor agreement demonstrates the Commission's lack of expertise. There, the Commission first held the incorporation papers of an employer's collective bargaining association subject to section 15 as well as a longshore gang allocation system. It did so on virtually the same grounds as in its decision here. (*United Stevedoring Corp. v. Boston Shipping Ass'n*, 15 F.M.C. 33

11. The assertion in the petition that the Shipping Act is a "surrogate for the antitrust laws" (Pet. 18, n. 14) is misleading in the present context. The Act is a surrogate for the antitrust laws insofar as Congress substituted regulation for competition in pricing of shipping services and as to certain competitive marketplace practices. It is not a surrogate for the antitrust laws in the sense that the Commission applies or can properly be expected to apply pro-competition antitrust policies to any great degree.

(1971).) The First Circuit, remanding on the Commission's own motion with "some reluctance", found the Commission's view of the union as being indifferent to the terms "plainly erroneous" and observed that:

> "[I]n all frankness we are compelled to remark that our initial reaction to the Commission's ruling is one of astonishment." (*Boston Shipping Ass'n v. United States*, No. 72-1004 (1st Cir. May 31, 1972), 8 S.R.R. 20,828, 20,830.)

Recognizing the inconsistency of successful collective bargaining and subjecting the bargaining to pre-implementation approval by a non-labor agency, the First Circuit described the Commission's ruling as:

> ". . . the maternal 'hang-your-clothes-on-a-hickory-limb-but-don't-go-near-the-water' adjuration, feel free to negotiate your bathing suit purchase, and mother will decide later if you can wear it." (*Id.* at 20,830.)[12]

On remand, the Commission reversed itself in all respects after distilling this Court's labor exemption decisions into four brief guidelines. (See n. 6, *supra*) (*United Stevedoring Corp. v.*

12. The court quoted from the Brief for the United States as follows:
> " 'The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. Moreover, the fact that Commission approval would have to be obtained before the agreement could be put into effect would necessarily delay—for the period of the Commission hearing and decision and possible court review—the implementation of the agreement; and this delay may, in turn, cause industrial strife.' " (*Id.* at 20,831.)

The maritime industry has for years been torn by labor strife. (*See, e.g.*, Douglas, J., dissenting in *Volkswagen*, 390 U.S. at 297-304.) The last thing that maritime labor relations need is an additional element of uncertainty. (*See* 543 F.2d at 406-407; Pet. 28a-29a.)

Boston Shipping Ass'n, 16 F.M.C. 7, 13 (1972).) The Commission's mechanistic application of these tests here and its determination that failure to meet any one of them was a basis for revoking the exemption led the court below to caution the Commission that simply:

> "parsing the Court decisions in this highly complex area may over simplify the balancing process required . . . ." (543 F.2d at 411; Pet. 40a.)

It is difficult to see how treating the maritime industry like other industries in leaving labor exemption questions to the federal courts defeats any Shipping Act objectives. The Act and its legislative history are silent on labor agreements of any kind. There is no suggestion therein that the maritime industry, alone among regulated industries, should have its labor relations subject to advance approval by the governmental body regulating industry rates. (543 F.2d at 406; Pet. 28a.) The Commission itself previously recognized that labor matters were at best peripheral to its regulatory concerns:

> "While we cannot here decide that every such collective bargaining agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend . . . a rulemaking proceeding in order *to exempt for the future this class of agreements from some or all of the requirements of section 15* of the Shipping Act, 1916, *thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do.*" (*United Stevedoring Corp. v. Boston Shipping Ass'n, supra*, 16 F.M.C. at 15.) (Emphasis supplied.)

This subject remained the least of the Commission's concerns as no rule making was ever announced, leading Commissioner Morse, dissenting here, to demand: "I again ask *WHEN* is this Commission proposing to initiate such a proceeding?" (J.A. 533, n. 20; Pet. 74a, n. 20.) (Emphasis in original.)

3. The Posture of the Case Does Not Present Pennington/Jewel Tea Questions.

The petition does not state that the case presents the Court with an important question concerning the scope or the application of the labor exemption. It concludes, however, that "on the basis of *Pennington* and related cases . . . . no labor exemption should have been applied . . . ." (Pet. 19-20.)

The court of appeals, of course, did not "apply" a labor exemption to the agreement. In view of its disposition of the case, it did not have to decide specifically that the Commission's resolution of *Pennington* questions was erroneous, although this was a contention vigorously argued by PMA and ILWU. As a consequence, in the posture of the case here, *Pennington* contentions[13] alluded to in the petition are not ripe for consideration and are not grounds for granting the writ.

The court of appeals determined that the nonmember objections to the PMA/ILWU agreement were in essence objections that an improper bargaining unit was imposed, a question under the labor laws within the expertise of the NLRB and presenting "at worst . . . *Pennington* considerations" for a federal district court to resolve. (543 F.2d at 410; Pet. 37a.) Further, the court made clear that the Commission's denigration of ILWU's interest in the terms bargained—the basis for the Commission's ruling that the contract terms were not mandatory bargaining subjects—was "highly questionable".[14] (543 F.2d at 397, n. 1; Pet. 3a, n. 1.)

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13. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). Only if the Court were to grant the petition and further were to disagree with the court of appeals' disposition of the case would it reach the *Pennington* questions argued below. Even then the Court should first obtain the benefit of the court of appeals' resolution of those issues.

14. Even if, unlike here, the terms involve significant market restraints, they are labor exempt if they have a "substantial effect" on wages.

The *Pennington* issues,[18] referred to throughout the petition but not directly posed, are based on Commission conclusions which were the subject of a vigorous, lengthy but necessarily unresolved argument before the court of appeals. Even assuming it were necessary and important for the Court to resolve these issues they should first be resolved by the court below. But in any event, the court of appeals' de facto rejection of the Commission's denial that the terms were mandatory subjects of bargaining and the court's "caution" to the Commission against its mechanistic "parsing the Court decisions in this highly complex area" and against oversimplification of the required balancing process (543 F.2d at 411; Pet. 40a) make the petition's reliance on the Commission's *Pennington* conclusions, an unacceptable basis for review in this Court.

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hours, or other subjects of union concern (*Federation of Musicians v. Carroll*, 391 U.S. 99, 112 (1968)) or are:

> "so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide arm's length bargaining [is] in pursuant of their own labor policies, and not at the behest of or in combination with non-labor groups." (*Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965); *see Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546 (7th Cir. 1970); *Dolly Madison Industries v. Teamsters Local 592*, 182 N.L.R.B. 1037 (1970).)

Of course, no question of forfeiture of a labor exemption properly arises unless at a minimum there are findings that the bargaining terms fixed prices, divided markets, imposed ruinous predatory terms on other employers or otherwise involved market restraints of significant magnitude. (*United Mine Workers v. Pennington, supra; Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945); *see Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 625 (1975).) This case comes here with no such findings and without evidence which would support such findings.

15. PMA and ILWU vigorously contested the Commission's conclusion that the terms were not mandatory bargaining subjects, the finding that the nonmember terms would, as a practical matter, be imposed, the conclusion that no conspiracy or other agreement to impose the terms was necessary to revoke the labor exemption, the statement implying that there were higher costs for nonmembers than for members because of geographical considerations and the conclusion that a labor exemption could be revoked without a finding that the bargaining was not in good faith and in the face of uncontradicted evidence that it was in good faith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

R. FREDERIC FISHER
LILLICK MCHOSE & CHARLES

Attorneys for Respondent
Pacific Maritime Association

Of Counsel
EDWARD D. RANSOM
GARY J. TORRE
BARBARA H. BUGGERT

February 4, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief in Opposition to Petition for a Writ of Certiorari for Petitioner Pacific Maritime Association upon all parties by causing three (3) copies thereof to be mailed, postage prepaid and properly addressed, to each of the counsel of record.

Executed this 4th day of February at San Francisco, California.

R. FREDERIC FISHER

Appendix A

Section 15 of the Shipping Act, 1916 (46 U.S.C. § 814):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between con-

ferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or cancelled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Appendix B

IX. ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The "ILWU-PMA Nonmember Participation Agreement" is revised as follows:

ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The PMA-ILWU jointly registered work force (hereinafter referred to as the "joint work force") exists as a result of the registration process beginning in 1935 under successive Pacific Coast Longshore and Clerks Agreements (herein called "PCLCA") and the Walking Bosses and Foremen's Agreement. These agreements have been between the Pacific Maritime Association and its predecessors (PMA) and the International Longshoremen's and Warehousemen's Union and its longshore, clerks and walking bosses/foremen's locals in California, Oregon and Washington (ILWU). The men in the joint work force have "jobs" in which they work on an interchangeable basis for the many business entities involved in or related to the movement of cargo to and from ships in California, Oregon and Washington. Some of these business entities are not members of PMA. The following provisions apply to such nonmembers of PMA.

1. A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation Agreement if it uses men in the joint work force.

2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.

3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA.

For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA.

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

4. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 10 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force.

5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall partici-

pate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU.

6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.*

7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerk/and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

8. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the manner prescribed for members of PMA.

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*As a result of decisions of the NLRB in other cases, the incorporated "CFSS" provisions of the PCLCA and hence of clause 6 are inapplicable. (*ILWU (California Cartage Co.)*, 208 N.L.R.B. 986, 994 (1974), *aff'd without opinion*, 515 F.2d 1017, 1018 (D.C. Cir. 1975) *cert. denied* ..... U.S. ....., 47 L.Ed.2d 347 (1976).)

Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be demed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force.

9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay.

10. If a nonmember participant becomes delinquent under paragraphs 7, 8, or 9 hereof no joint work force workers shall be furnished to the delinquent nonmember.

11. It is believed that all provisions of this agreement are now lawful, and it is assumed that they will continue to be lawful. Should there at any time be a determination that any portion of this agreement is contrary to law, the remaining provisions shall continue to be binding upon the parties unless ILWU or PMA gives notice of the termination of this entire agreement.

12. The ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare,

Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Dated: .....

Agreed to by:

.....
(Participant)

By .....

Approved by
PACIFIC MARITIME ASSOCIATION
on behalf of its members

.....

Approved by
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

.....

Appendix C

Regulations for Filing Section 15 Agreements
Proposed as 46 C.F.R. § 522.5
(41 Fed. Reg. 51622-23 (Nov. 23, 1976))

Section 522.5, *Supporting Statements and Evidence*

(a) All applications for approval of agreements pursuant to section 15 of the Shipping Act, 1916, shall be accompanied by a statement which sets forth the purpose of the agreement and the particular circumstances which necessitate the agreement.

(b) In addition to the requirements of paragraph (a) of this section, any agreement providing for (1) fixing or regulating of transportation rates or fares; (2) controlling, regulating, preventing or destroying competition; (3) pooling or apportioning earnings, losses, or traffic; (4) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or, (5) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; shall be accompanied by evidence demonstrating the serious transportation need requiring the agreement, or the important public benefits which the agreement is necessary to secure, or the valid regulatory purpose of the Shipping Act of which the agreement is in furtherance. As used in this paragraph, evidence includes affidavits of fact made by persons having knowledge of the matters contained therein and authenticated documents such as, for example, records kept in the ordinary course of business. Evidence does not include arguments, opinions and conclusions of counsel.

(c) In addition to the requirements of paragraph (a) of this section, any application for the approval of an agreement which appears to be violative of the antitrust laws and which provides for (1) giving or receiving of special privileges or advantages, or (2) any exclusive, preferential, or cooperative working arrangement, shall also comply with the requirements of paragraph (b) of this section.

(d) Any application for approval of agreements pursuant to section 15 which fails to comply with the provisions of this section shall be returned without action and without prejudice to resubmission in compliance with the requirements of this section.

(e) (1) All protests against the approval of agreements filed pursuant to section 522.3 shall be accompanied by (i) a statement which: (A) specifies the position of the protestant in regard to the approvability of the agreement protested, and all constituent parts thereof; (B) identifies, with particularity, the reason or reasons why the agreement protested should not be approved; (C) admits or denies the existence of the need, benefit, or purpose submitted in accordance with paragraphs (b) or (c) of this section by the parties to the agreement protested; (D) alleges facts which support the reasons identified pursuant to (B) of this subdivision; and, (ii) any evidence tending to prove the allegations made pursuant to this paragraph.

(2) Failure to comply with the requirements of this paragraph shall result in the Commission's consideration of the agreement protested without regard to the protest. Such Commission action shall not, however, preclude the protestant from seeking leave to intervene under section 502.72 of Part 502 of this chapter, in any proceeding arising out of such consideration.

(f) Where the supporting statements and evidence submitted under paragraphs (a), (b), (c) and (e) of this section are deemed insufficient or incomplete, the Commission may, in lieu of the actions permitted under paragraphs (d) and (e) (2) of this section, require the submission of additional data or information.